NOS. 87, 290, 291

In the Supreme Court of the United States

OCTOBER TERM, 1947

ORSEL McGHEE and MINNIE S. McGHEE, his wife,
Petitioners,

v.

BENJAMIN J. SIPES and ANNA C. SIPES, JAMES A. COON and ADDIE A. COON, et al,
Respondents.

JAMES M. HURD and MARY I. HURD,
Petitioners,

v.

FREDERIC E. HODGE, LENA A. MURRAY HODGE, PASQUALE DeRITA, et al,
Respondents.

RAPHAEL G. URCIOLO, ROBERT H. ROWE, ISABELLE F. ROWE, et al,
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ON WRITS OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN AND THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

MOTION OF THE MOUNT ROYAL PROTECTIVE ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE.

THOMAS F. CADWALADER,
CARLYLE BARTON,
Counsel for The Mount Royal Protective Association, Inc.

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Mount Royal Protective Association, Inc., respectfully moves for leave to file the accompanying brief as *amicus curiae* for the following reasons:

1. The decisions in the cases are of vital consequence to the membership of The Mount Royal Protective Association, Inc. An explanation of the interest of this Association is set forth in the accompanying brief.

2. Counsel for petitioners and respondents in each of these cases have given their consent to the granting of this motion.

THOMAS F. CADWALADER,
CARLYLE BARTON,
Counsel for The Mount Royal
Protective Association, Inc.

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BRIEF OF AMICUS CURIAE.

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STATEMENT OF THE INTEREST OF THE MOUNT ROYAL PROTECTIVE ASSOCIATION, INC.

The Mount Royal Protective Association, Inc. is a body corporate incorporated under the laws of the State of Maryland for the purpose of representing the property owners in a residential part of the City of Baltimore commonly known as the Mount Royal District. This area extends from Mount Royal Avenue on the northeast to and including Eutaw Place on the southwest and runs northwesterly from Dolphin Street to Druid Hill Park, which forms the northwestern boundary of the district. It is about six city blocks in width and a maximum of nine in length, the upper part of the district being somewhat irregular in shape. The corporation is a non-profit organization and its main functions have been to represent the interest of the property owners in such matters as zoning laws, the invasion of this residential district by commercial or otherwise undesirable enterprises and in general to support the efforts of the inhabitants to secure the amenities of life within the neighborhood.

Since 1921 it has fostered, as one of its activities, a movement, begun by others, to induce property owners to preserve the neighborhood for the use of white residents by executing covenants, to be recorded among the Land Records of Baltimore City, respecting the use to which the several properties could be put to the end that they could not be occupied by negroes or persons of African descent except those employed as domestic servants by the occupants. A copy of the form of covenant which was used is filed as an appendix to this brief. Over ninety percent of the residence properties in the district have been subjected to this restriction by this means. The restric-

tion has been kept in force, and attempted violations have been quashed by threatened suits or by injunctions obtained from local equity courts, with the result that the properties covered by the covenant have been completely restricted in fact to occupancy by white people.

There are other parts of the city of Baltimore where similar restrictions have been agreed to and put on record by the property owners, but many have not been fully enforced, and as a consequence much residential property in the city which was sought to be restricted against negro occupancy by this means has become occupied by persons of that race. In such instances the doctrine of the Maryland courts is that the covenant against such occupancy is no longer enforceable. In particular, the territory immediately adjoining the Mount Royal District lying to the southwest of Eutaw Place and of greater area is almost exclusively occupied by colored people. The same is true of much of the rest of the older part of Baltimore City. These are not in any sense of the word slum districts and although there are slums in Baltimore, both white and negro, it would be utterly untrue to say that the practice of voluntary restrictive covenants in Baltimore has resulted in forcing the large negro population to congregate in districts of sub-standard housing and inadequate public services. The colored area and the white area in northwest Baltimore are almost identical in physical characteristics and the quality of the dwellings is equivalent.

It is generally true, however, that when some of the dwellings in a block become occupied by colored people, the white inhabitants move away at the first opportunity, so that in the course of a few years the block becomes wholly occupied by negroes. In the past this usually resulted in a great depreciation in the value of the property,

and white owners have often been compelled to sell their properties at a loss, but this is no longer necessarily true. In fact, especially during the war years, much property has recently passed from white into negro hands at a profit to the white owners. Nevertheless many white owners object strongly to being forced to part with their homes and move elsewhere even if they can do so without financial loss, and yet they feel that once negroes occupy property in the same block they could not remain without losing contact with their friends and finding themselves in a wholly uncongenial atmosphere. Thus, as a general rule, it is considered advantageous, from the standpoint of property value as well as personal convenience and happiness, to own residential property which is located in a section where covenants against negro occupancy exist and are enforced.

This court has before it the question of the validity of restrictive covenants substantially similar in effect to those executed by the members of The Mount Royal Protective Association, Inc. Should such covenants be held invalid for constitutional reasons, the effects on the social life and economy of the entire City of Baltimore would be extremely serious. It is for this reason that the Association has filed a motion asking that it be allowed to file a brief as *amicus curiae* in these cases.

ARGUMENT.

I.

PRIVATE CONTRACTS CONTAINING RACIAL RESTRICTIONS NOT INVALID.

The right of property owners to contract with each other, for their mutual benefit, protection or advantage, to subject their property to restrictions has long been recognized

in all our jurisdictions. The limits of this right also form an important branch of the substantive law in every state. Among these conceded limitations, and probably the oldest and best established of them, is that which forbids restraints on alienation. No such restraints appear in the covenants signed by the members of this Association or any other similar covenants, with which we are familiar, that have been executed by owners of property in the City of Baltimore. The restrictions are only as to use and occupancy.

The City of Baltimore is one of the few very large cities in this country containing a large proportion of negroes which has been singularly free from the race riots that have disfigured and disgraced many other communities. Any impartial observer conversant with the facts of city life would testify that this immunity is not unconnected with the fact that the races have been physically separated to a great extent and for the most part are not closely mingled in the same blocks. It should be remembered, of course, that in this city, as in other eastern cities, the bulk of the population resides in solid rows of houses, not in detached dwellings, so that neighbors are in much closer physical proximity to each other than they ever are in the newer cities of the West. That there was much crime and disorder during the war years when the working population, white and black, were very much congested is true, but the fact remains that outbreaks that could properly be called riots have not occurred.

The City and State have done nothing through laws or ordinances to cause the segregation of the races into separate blocks or sections except that in building new housing developments assisted by funds of the Federal Housing Administration it has been uniform procedure to designate

the developments for either white or colored occupancy. It would have been utterly contrary to the sentiments and wishes of the population if any of these developments had been thrown open to an indiscriminate mixture of the races, and we submit that few persons conversant with local affairs believe that this could have been done without inviting much disorder and many breaches of the peace. However, this Association had no concern with these housing developments, for its membership consists entirely of the owners of private dwellings and apartment houses in a certain defined geographical section of the city, who have agreed among themselves to restrict the land and buildings they own against occupancy by those of the negro race except as household servants employed therein.

The question before the Court is whether any clause of the United States Constitution is violated by these private contracts. Certainly no one of the first eight amendments to the Constitution contains any language that by any sort of interpretation could be held to affect them. The covenants deprive nobody of life, liberty, or property. The owners of the restricted premises have voluntarily agreed to the restrictions and their enforcement cannot be said to be an unconstitutional deprivation of property rights insofar as the owners are concerned. A prospective buyer has no liberty or right to enter upon and occupy the property of a seller who has contracted to devote it to another use.

Certainly no privileges or immunities of citizens of the United States are involved. *Maxwell vs. Dow*, 176 U. S. 581 (1900).

The only other question would arise under the Fourteenth Amendment, i.e., whether any rights of liberty or property protected by that amendment are violated with-

out due process of law. Is a voluntary agreement between property owners as to the use and occupancy of their property such as they have been authorized to make throughout all history, a deprivation of liberty or property rights in others than the owners? The question seems to answer itself.

If the Fourteenth Amendment is considered as importing some of the same rights guaranteed by the original Bill of Rights to citizens of the United States as a restriction upon action taken within the states, *Palko v. Connecticut*, 302 U. S. 319 (1937); even though not by state action, then it must be remembered that the non-enumerated rights protected by the Ninth Amendment are also subject to protection. Among these non-enumerated rights is certainly the right to regulate the occupancy and use of property by private contract. Such right clearly existed at the date the Bill of Rights was adopted and nothing has since occurred to limit it.

It may be argued that the right of private contract never extended to contracts considered to be against public policy. Still it has not yet been held, except under the Commerce Clause, that public policy as affecting private contracts presents a Federal question. So long as any of the fundamental freedoms referred to in the opinion of Cardozo, J., in *Palko vs. Connecticut, supra,* are not affected, there could be no such Federal question. In general what constitutes public policy is a matter for the several states to determine, and always has been so recognized. Can it be said that the adoption of the Fourteenth Amendment made any change in this regard? Certainly the *Slaughter House Cases*, 16 Wall. 36 (1873), which have been consistently followed, strongly negative any such theory.

In the year 1937 the validity of a similar covenant, or eighborhood agreement as these restrictions have come to e known, came before the Court of Appeals of Maryland the case of *Meade vs. Dennistone*, 173 Md. 295 (1937), nd was fully argued there. It was held that the covenant nough expressed to "run with the land", as is the case with ne covenant used by this association, was not within that ass of covenants because of the absence of privity of state between the covenantors and covenantees. However, it was stated that such covenants imposed a "servitude, or easement, or right of amenity, protected in equity", *leade vs. Dennistone, supra*, p. 303. The question as to hether these contracts denied the negro defendant equal rotection of the laws was considered and answered with ne citation of the numerous decisions reached in the upreme Court holding that this Constitutional inhibition upon the power of the State but not on the right of individuals to contract with respect to their property. The test of these cases cited was *Corrigan vs. Buckley*, 271 . S. 323 (1926), in which this Court unanimously held nat the contention that the contract violated the Fifth, hirteenth and Fourteenth Amendments, was "entirely cking in substance or color of merit. * * * None of these nendments prohibited private individuals from entering to contracts respecting the control and disposition of eir own property." In accordance with this binding decision the Maryland Court of Appeals held that the constitutional question had been settled by final authority. *eade vs. Dennistone, supra*, p. 302. It was also held that ne restriction was not void as a restraint on alienation, ecause it contained no such restraint, citing the following ses, all of which indicate that covenants restricting use nd occupancy by negroes but not restricting alienation negroes are valid, *Meade vs. Dennistone, supra*, p. 307;

Cowell vs. Colorado Springs Co., 100 U. S. 55 (1879);
Wayt vs. Patee, 205 Cal. 46 (1928);
Janss Investment Co. vs. Walden, 196 Cal. 753 (1925);
Parmalee vs. Morris, 218 Mich. 625 (1922);
Los Angeles Investment Co. vs. Gary, 181 Cal. 680 (1919);
Brown vs. Hobbs, 132 Md. 559 (1918);
Mandlebaum vs. McDonell, 29 Mich. 78 (1874).

In *Parmalee vs. Morris, supra*, the Court used the following language in its opinion:

> "The law is powerless to eradicate racial instincts or to abolish distinctions which some citizens do draw on account of racial differences in relation to their matter of purely private concern. For the law to attempt to abolish these distinctions in the private dealings between individuals would only serve to accentuate the difficulties which the situation presents. * * * Whether this action on the part of the owner was taken to make the neighborhood more desirable in his estimation or to promote the better welfare of himself and his grantees is a consideration which I do not believe enters into a decision of the case."

It is true the Fourteenth Amendment made negroes citizens of the United States and of their respective states, equal in all civil and political rights with white citizens, but how are the civil or political rights of either race limited by the covenants under consideration? Persons of either race are free to agree among themselves to place the same sort of restrictions upon property holdings. The law of Maryland, and of other states also, is well settled that such restrictions are subject to the same general rules as other restrictions such as those having to do with the use to which property may be put, the set-

backs from the property line that must be observed, the height, style or materials to be used in construction, and even the cost of the building. All these and other restrictions are sustained as being valid when they are part of a general plan of improvement or preservation of a neighborhood, but if they are allowed to lapse so that the neighborhood is no longer in the same condition as when the restrictions were imposed, they are held to be no longer enforceable.

It is very clear that if 90% or 100% of the property owners in certain Baltimore blocks restrict their properties against negro occupancy and then permit such occupancy to occur without taking steps to enforce the restriction, they will be held to have waived it so that it will no longer be enforceable in the Maryland courts. This has actually occurred and much property in the City of Baltimore is now occupied by negroes on which restrictive covenants against such occupancy have been recorded, but because the owners of the property affected failed to stand on their contract rights at the proper time, the restrictions have completely lapsed. They are only effective where the owners in the restricted area consistently maintain these restrictions by timely application for relief against their violation.

In considering the constitutional question here involved, viz: whether rights guaranteed citizens of the United States by the Fourteenth Amendment are denied when a state, through its courts, refuses to invalidate restrictions of the type under review as contrary to public policy; another factor must be given full cognizance. This is the fact that ordinarilly local authorities have been charged with the duty of minimizing tension and preventing public disorder that has always resulted when different races have

lived side by side in the same territory, under the same government. In the United States, the only large and populous area where two such races reside side by side with the same legal and civil rights, there is little if any social intermingling. In many states of the Union, including Maryland, intermarriage between the races is not permitted and is punishable as a crime. Separate schools are provided. The Federal courts have always recognized the right of the states to segregate pupils provided each race is afforded equal opportunities for education. No doubt it would be a deprivation of property rights if either race were not permitted to acquire title to property under the same terms as the other, or if the law interposed arbitrarily to forbid certain properties to be occupied by either race. Segregation ordinances of this character were passed in several cities, including Baltimore and Annapolis, but have been held void in accordance with the decision of this Court in *Buchanan vs. Warley*, 245 U. S. 60 (1917); *Jackson vs. State*, 132 Md. 311 (1918). But to say that property owners themselves cannot by agreement limit the occupancy of the neighborhood where they reside to such classes of tenants as are in accord with their views or prejudices would be an exceedingly long step towards invading the sphere of social conventions and what are called in the civil law "imperfect obligations", and a step which no courts of the common law have yet taken.

This Court has unanimously declined jurisdiction over the determination of the public policy of a local government with respect to this very matter. *Corrigan vs. Buckley, supra.*

II.

THE NON-ENUMERATED RIGHT OF PRIVATE AGREEMENT IS PROTECTED BY THE BILL OF RIGHTS.

The United States never accorded to Indians the same rights as to white citizens. It has permitted, and indeed created, a discrimination against Chinese and other Asiatics. But its policy has been, for one reason or another, to impose a doctrine of absolute civil equality between negroes and whites. This has been a tremendous experiment. It was looked upon with grave misgivings at the time the Fourteenth Amendment was declared adopted, and, indeed, has been ever since, by a substantial part of the population including many devoted to the ideal of treating negroes with the same impartial justice as we demand for white men. But when the intimate relations of the members of the two races can no longer be regulated by voluntary and peaceful action of the people most concerned, the experiment of 1868 will have been expanded into a much more hazardous experiment, in short the attempt to impose by legal fiat a commingling of racial stocks to which the majority in number of both races is at heart bitterly opposed.

Surely the right of individuals to regulate their contacts with other individuals through the system of private clubs and associations, both religious and secular, through the intricate system of social conventions and manners and private agreements, which regulate the daily lives of people everywhere, is one of those rights that never were enumerated in any Bill of Rights but have always been recognized as inherently belonging to free people in a free society.

What meaning can be given to the Ninth Amendment other than a command that such rights be respected by

Congress? Some of the states may have invalidated certain of these rights, and may possibily have outlawed the right of restrictive covenants here in question, by declaring them against their public policy. But compared to the United States, the States are relatively small and compact and their governments directly responsible to local public opinion. It is no part of the concept of liberty to force unwilling communities into the same Procrustean bed. If the right to restrict the use of property on racial grounds is not one of the freedoms included in the due process clause of the Fourteenth Amendment, by importing therein the Ninth Amendment, it is at least a right which the Congress has never been given power to change or abolish. In other words, if this right is not protected against such action by the commands of the Fourteenth Amendment regarding State powers, it certainly remains one of those rights which, under the Tenth Amendment, the states alone can regulate. It is clear that it is not subject to regulation by any affirmative act of Congress and it also is clear that if Congress should ever claim such a power, the provisions of the Ninth Amendment would be contravened.

III.

ENFORCEMENT BY STATE COURTS OF VALID PRIVATE CONTRACTS IS NOT A DENIAL BY THE STATE OF ANY CONSTITUTIONAL RIGHT.

A single question remains. Assuming that individuals have a right to limit the use of their property as they please, does the State have a right, by the process of its courts, to enforce these private agreements, embodying, as they do, discrimination which is considered arbitrary by some because based on distinction of race rather than of occupation or economic status?

It is respectfully submitted that the answer may be briefly stated thus: If individuals have the right to con-

tract with each other for what they consider their own benefit or protection and it be admitted that such contracts are in themselves not illegal, then the States have a right to give these contracts the sanction of legal enforcement to the same extent as any other agreement. The act of discrimination resides in the private agreement not in the process of enforcement. To say that individuals may lawfully contract with each other to discriminate against other individuals, but that if they do, the courts cannot enforce such contracts is a contradiction in terms. If the power to enforce is struck down, then the contracts themselves are struck down, or at least relegated to the sphere of "imperfect obligations" above referred to. The next step would be to forbid even incurring such obligations and punishing them as conspiracies. This brings the pretended protection of human liberty full circle into a deprivation of the most elementary rights of freedom of association and freedom of choice.

CONCLUSION.

The effort to protect the fundamental rights of persons of widely different races living together is bound to fail unless the members of the population are permitted to make the necessary adjustments by their free and untrammeled action so long as they do not trench on the essential liberties of anybody. No person has the essential liberty to occupy anothers land whether the owner refuses him admission by reason of an unjustifiable prejudice or mere whim. Prejudices cannot be eradicated by law. This is specially true of certain so-called prejudices, which many persons feel are not prejudices at all but a mere recognition of the facts of life and nature. In countries where the color line in social relations has been completely obliterated the favorable results, if any, are not so impressive as to lead prejudiced persons to discard their feelings

completely. If the experiment of complete civil equality between races is to be given a chance for ultimate success, it is necessary that scope be allowed for such fair and voluntary adjustments of an inescapable problem as the people themselves will make in view of the particular conditions in their respective localities and neighborhoods. If this right is to be outlawed in this country the future of a satisfactory solution of this extremely delicate and difficult question will be dark indeed.

Respectfully submitted,

THOMAS F. CADWALADER,
CARLYLE BARTON,
Counsel for The Mount Royal
Protective Association, Inc.

APPENDIX.

FORM OF RESTRICTIVE COVENANT.

WHEREAS, the following parties hereto are seized or possessed of the following properties in the City of Baltimore, in the State of Maryland, following their respective names, of some interest or estate therein:

Names	Properties
.....	.....
.....	.....
.....	.....
.....	.....

AND WHEREAS the said parties hereto are desirous of entering into an agreement protecting their respective properties in the particulars hereinafter provided for;

NOW THEREFORE each and all of said parties, in consideration of the execution of these presents, and of the mutual covenants, agreements and stipulations herein contained, and other good and valuable considerations to them, and each of them, thereunto moving, the receipt whereof by each and all of them is hereby acknowledged, do hereby jointly and severally for themselves, and each of themselves, their, and each of their heirs, personal representatives, successors and assigns, grant, warrant, covenant, promise and agree among themselves, and each and all of them with all and each of the others, their and each of their heirs, personal representatives, successors and assigns, that they, and each of them, their, and each of their, heirs, personal representatives, successors and assigns, shall and will have hold and stand seized and possessed of the said re-

spective properties, interests and estates subject to the following restrictions, limitations, conditions, covenants, agreements, stipulations, and provisions, to wit: That neither the said respective properties, nor any of them, nor any part of them, or any of them shall be at any time occupied or used by any negro or negroes, or person or persons, either in whole or in part, of negro or African descent, except only that negroes, or persons of negro or African descent, either in whole or in part, may be employed as servants by any of the owners or occupants of said respective properties and as and whilst so employed may reside on the premises occupied by their respective employers.

That no sale, lease, mortgage, disposition or transfer thereof shall be made or operate otherwise than subject to the aforesaid restrictions as to and upon use and occupancy; that neither the said parties, nor any of them, their, or any of their, heirs, personal representatives, successors, or assigns, will do, or suffer or permit to be done, any of the matters or things above mentioned, excepting only as aforesaid, and then all the restrictions, limitations, conditions, covenants, agreements, stipulations, and provisions, herein contained shall run with and bind the land, and each and all of the above mentioned property and premises, and every part thereof, and the heirs, personal representatives, successors or assigns, of each and all of the parties hereto, and shall be kept and performed by, and enure to the benefit of, and be enforceable by, all and every person and persons, and bodies politic or corporate, at any time owning or occupying said land, property, premises or interests, or estates, or any of them, or any part of them; but no owners or occupants shall be responsible except for his, her or its acts of defaults, while owner or occupants.

Provided that the above restrictions and agreements or any of them in whole or in part may be removed at any time by a deed executed by the then owners of 51% of the properties effected by this agreement.

Witness the hands and seals of the parties hereto.

Witnesses to Signatures	Signatures of Parties
.....	..... (Seal)
.....	..... (Seal)
.....	..... (Seal)
.....	..... (Seal)

STATE OF MARYLAND, CITY OF BALTIMORE, TO WIT:

I hereby certify on this ..... day of ..... in the year one thousand nine hundred and forty ..... that before me, the subscriber, a Notary Public of the State of Maryland in and for the City of Baltimore aforesaid, personally appeared .....

.....

.....

.....

.....

and they each acknowledged the aforegoing deed and agreement to be their respective acts.

As witness my hand and notarial seal.

.....

Notary Public.